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No. 94-730

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOSEPH J. CICIPPIO, *et al.*,
Petitioner,

v.

ISLAMIC REPUBLIC OF IRAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion and order entered by the United States District Court for the District of Columbia (Pet. App. A-13 - A-17) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A-1 - A-10) is reported at 30 F.3d 164 (1994).

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1994 (Pet. App. A-11 - A-12). The petition for a writ of certiorari was filed on October 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

COUNTERSTATEMENT OF THE CASE

Invoking the district court's jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§1330, 1602 *et seq.*,[1] Joseph J. Cicippio, his wife Elham, and David Jacobson ("petitioners") brought suit against the Islamic Republic of Iran ("Iran") for tortious injury suffered in Lebanon. Their complaint alleged that in 1985 and 1986 Iran, "through its agents and servants . . . promoted, financed [and] directed" the capture and detention of petitioners Joseph Cicippio and Jacobson in Lebanon. (Complaint ¶¶ 4-5). Petitioners sought damages for numerous wrongs inflicted on them in Lebanon including kidnapping, physical abuse, false imprisonment, violation of international human rights and loss of past and future job opportunities with their employer, the American University in Beirut. (*Id.* ¶¶ 22-37 and 50-58). The complaint further alleged that the taking of hostages "are activities which governments do not normally and

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[1] For ease of reference, we refer in this brief only to the sections of the FSIA as codified in Title 28, U.S.C.

cannot lawfully undertake," and that "the acts of Iran were not sovereign, but were wrongful acts of a commercial nature." (*Id.* ¶ 6).

Petitioner Elham Cicippio, who throughout the period of her husband's detention remained in Beirut, sought damages for loss of her husband's consortium, infliction of emotional distress and mental impairment. (*Id.* ¶¶ 42-49). The six causes of action set forth in the complaint sought damages totaling in excess of $600 million.

Iran appeared and filed a motion under Rule 12(b), F.R.Civ.P.,to dismiss the suit for lack of subject matter and personal jurisdiction.[2]

The district court granted the motion and dismissed the complaint for lack of subject matter jurisdiction under the FSIA. It ruled that hostage taking is not the kind of "commercial activity" contemplated by Congress when it enacted the "commercial activity" exception to foreign sovereign immunity, §1605(a)(2). (Pet. App. A-15). It further held that petitioners' reliance on the non-commercial tort exception to sovereign immunity, §1605(a)(5), was misplaced, since none of Iran's alleged tortious acts occurred in the United States or caused

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[2] Solely for purposes of its jurisdictional motion in the district court, Iran was required to accept the well-pleaded facts in the complaint. Counsel, however, has been asked respectfully to inform the Court that Iran had no involvement in petitioners' detention in Lebanon and that the Government of Iran emphatically rejects the baseless allegations of the complaint.

injury to the petitioners in the United States as required by §1605(a)(5). (Pet. App. A-14).

On appeal, the court below affirmed the district court's lack of subject matter jurisdiction. It cited and relied on dispositive case law from this Court establishing that neither the commercial activity exception to foreign sovereign immunity, *Saudi Arabia v. Nelson*, 113 S.Ct. 1471 (1993); *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160 (1992) (Pet. App. A-5 - A-7), nor the non-commercial tort exception, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), could serve as jurisdictional predicates for this suit.

SUMMARY OF ARGUMENT

1. The court below correctly ruled that the kidnapping and detention of petitioners Joseph Cicippio and David Jacobson "byitself cannot possibly be described as an act typically performed by participants in the market (unless one distorts the notion of marketplace to include the hostage bazaar)." (Pet. App. at A-8). In *Weltover*, the Court ruled that in the context of foreign sovereign immunity the term "commercial" refers to the type of actions "by which a private party engages in 'trade and traffic or commerce'." 112 S.Ct. at 2166, citing Black's Law Dictionary. Kidnapping and imprisonment are plainly not the means by which private parties engage in commercial activities.

Petitioners urge, in the alternative, that the tortious

and criminal acts committed by supposed agents of Iran in Lebanon should be regarded as "commercial" in nature because they were done for the purpose of securing the return of Iran's frozen properties and to induce the United States government to sell arms to Iran. The argument, however, is refuted by the FSIA's express provision that the purpose which motivates a foreign state to engage in a commercial activity is not germane to a determination whether the act is commercial in nature; it is the character of the act alone that is of jurisdictional significance.

Petitioners also wholly failed to show that the injuries they suffered in Lebanon had any direct effect in the United States, as required by the third clause of the commercial activity exception on which they seek to rely.

2. The court below was also correct in ruling that the non-commercial tort exception to sovereign immunity did not vest subject matter jurisdiction in the district court over the torts allegedly committed by Iran's operatives in Lebanon when they took petitioners hostage in Lebanon. Nor did the wife's claim for loss of consortium and emotional suffering in Lebanon fall within the non-commercial tort exception to sovereign immunity because the injury she claims to have suffered was suffered in Beirut, not in the United States. The FSIA provides on its face that, to be actionable, a non-commercial tort committed by a foreign state must be one that has "occurr[ed] in the United States." §1605(a)(5). The *Amerada Hess* Court squarely held that Congress intended the FSIA's tort exception to be limited to torts occurring

in this country, 448 U.S. at 440-441.

The decision below is fully consistent with the statutory scheme of the FSIA and this Court's interpretation thereof, and the petition presents no occasion for review by this Court.

ARGUMENT

I. THE CLAIMED HOSTAGE-TAKING BY IRAN DID NOT CONSTITUTE A "COMMERCIAL ACTIVITY" WITHIN THE MEANING OF THE FSIA, NOR DID THE HOSTAGE-TAKING CAUSE A "DIRECT EFFECT" IN THE UNITED STATES

Petitioners asserted below that Iran orchestrated their detention in Lebanon in an effort to use them as a bargaining chip to purchase arms from the United States and to secure the release of frozen property in the United States. They claimed that Iran thereby engaged in a commercial activity as defined in §1603(d) of the FSIA.[3] The assertion finds no support in the FSIA or in case law applying the restrictive doctrine of foreign sovereign immunity.

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[3] The petition reproduces almost verbatim the convoluted arguments that petitioners advanced in their brief below (Pet. 12-14), and that the court of appeals had considerable difficulty in following (Pet. App. A-4). Petitioners, however, fail to inform the Court of the reasons why the court of appeals rejected their arguments (see Pet. App. A-4 - A-5).

Under the restrictive doctrine as incorporated in the FSIA, a foreign state is denied immunity from suit for acts performed, or that cause a direct effect, in the United States if the acts are private or commercial in character (*acta jure gestionis*). §1605(a)(2). *Saudi Arabia v. Nelson,* 113 S.Ct. at 1479; *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 487 (1983). The FSIA directs that inquiries as to the character of a state's acts are to focus on the *nature* of the act rather than on its purpose, §1603(d). This Court has stated that as a guide to determining whether a given activity is "commercial," the question that should be posed is whether a private party would customarily carry on such activity for profit. *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. at 2166.; *Restatement (Third) of the Foreign Relations Law of the United States* §451 (1987) (foreign states are immune from the jurisdiction of our courts, except with respect to claims arising out of activities of the kind that may be carried on by private persons).

Contrary to petitioners' assertions, state-sponsored kidnapping and hostage-taking, no matter for what purpose it may be done, is not *by its nature* a commercial activity. A suit based on alleged kidnapping is not "a suit based upon a foreign state's participation in the market-place in the manner of a private citizen or corporation." *Weltover*, at 2166. Whether Iran's claimed conduct amounted to "hostage-taking for profit" (Pet. 9) is irrelevant to an analysis of the *nature* of the conduct. The *Nelson* Court emphasized in an analogous context, whether a state acts "in the manner of a private party" is a question of behavior, not motivation:

> [T]he intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to the abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. [Citations omitted]. Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such." (Citations and quotation marks omitted).

113 S.Ct. at 1479-80.

Even before this Court spoke in *Nelson*, lower courts' decisions firmly established that murder, kidnapping, hostage-taking and wrongful detentions were *not* the type of activities that are customarily carried out for profit by private persons.[4] Petitioners'

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[4] *See, e.g., Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) (state-sponsored terrorism and politically motivated assassinations are not traditionally the function of private individuals and cannot be considered commercial in nature), *cert. denied*, 464 U.S. 815 (1985); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.) (murder, no matter what its purpose, does not partake of the

characterization of Iran's alleged conduct as private and commercial within the purview of the FSIA, Pet. 8-9, simply does not bear scrutiny.

Petitioners' failure to establish that Iran engaged in a commercial activity renders inconsequential the second prong of their argument, *viz.*, that Iran's claimed commercial acts in Lebanon had a "direct effect" in the United States – a showing required by the third clause of the commercial activity exception, §1605(a)(2).

Although they accurately quote the *Weltover* Court's holding when an effect is "direct"[5] (Pet. 12), petitioners' attempted showing that Iran's claimed kidnapping had a "direct effect" in the United States is, to put it charitably, far off the mark. Thus, they say that "[p]etitioners Joseph Cicippio and David Jacobson were not returned to their homeland until the U.S. government and U.S. Banks [*sic*] proffered millions of dollars in assets and weapons to Iran." (Pet. 13). They claim that "[t]he

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nature of a commercial activity), *cert. denied*, 469 U.S. 1035 (1984); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980) (alleged kidnapping by a foreign state is not commercial activity under the FSIA), *cert. denied, sub nom. Arango v. Compania Dominicana de Aviacion*, 474 U.S. 995 (1985); *Kline v. Kaneko*, 685 F. Supp. 386 (S.D.N.Y. 1988) ("commercial activity" exception to sovereign immunity does not apply to Mexico's expulsion of an alien; even if activity in question amounted to kidnapping or abduction, as plaintiffs urged, such activity would not amount to commercial activity, because a private person cannot lawfully engage in kidnapping and abduction).

[5] "An effect is direct if it follows as an immediate consequence of the defendant's activity." 112 S.Ct. at 2168 (ellipsis and quotation marks omitted).

United States government was forced to expend over 35 million dollars, as well as hundreds of man-hours, to investigate the dealings between the government of Iran and this country." (*Ibid.*). They further claim that "the United States Military was forced to move entire military groups into the region surrounding Lebanon in an effort to facilitate an end to this situation." (*Ibid.*). They finally maintain that a "direct effect" was felt in this country because, during Joseph Cicippio's captivity, his employer, the American University in Beirut -- a corporation established under New York law -- continued to pay Mr. Cicippio's salary to his wife "without receiving services in return," and that "Mrs. Cicippio was forced to relinquish the moneys to Mr. Cicippio's captors in order to gain his release." (Pet. at 14).[6] -- These "effects" in the United States were impalpable with respect to the injuries petitioners asserted in the suit.

In consequence, the court below was correct in affirming the dismissal of petitioners' claims for lack of subject matter jurisdiction under the "commercial activity" exception to the FSIA.

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[6] Incredibly, in addressing these contentions, the petitions rely on the Eleventh Circuit's decision in *Nelson v. Saudi Arabia*, 923 F.2d 1258 (11th Cir. 1991), which this Court reversed in *Nelson*. Pet. at 13.

II. THE TORTIOUS CONDUCT OF IRAN'S ALLEGED AGENTS IN LEBANON DOES NOT SATISFY THE NON-COMMERCIAL TORT EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY

Argentine Republic v. Amerada Hess, *supra*, 488 U.S. 428, teaches incontestably that the non-commercial tort exception to foreign sovereign immunity, codified in §1605(a)(5), does not apply to the tort claims asserted in this case, and that, in consequence, the district court was not competent to hear petitioners' intentional tort claims. The *Amerada Hess* Court squarely ruled that the FSIA's non-commercial tort exception *applies only to torts committed in the United States or its territorial waters.* That holding is dispositive of the intentional tort claims asserted here, since the tortious activities claimed to have been committed by Iran's operatives occurred in Lebanon, and petitioners suffered harm there. The court below, therefore, was right in affirming the dismissal of petitioners' intentional tort claims for lack of competence under the FSIA.

This issue, too, presents no occasion for the Court to grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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